



United States Department of the Interior

BUREAU OF LAND MANAGEMENT

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To: All BLM-CA District and Field Managers

From: State Director

Subject: Bald and Golden Eagle Protection Act–Take Permit Guidance for Renewable Energy

Program Area: Renewable Energy (Wind, Solar, and Transmission)

Purpose: The purpose of this Instruction Memorandum (IM) is to provide supplemental guidance on the implementation of the BLM Washington Office IM 2010-156, dated July 9, 2010, for renewable energy and transmission rights-of-way on public land to comply with the Bald and Golden Eagle Protection Act (BGEPA) in California. Specifically, this IM defines how the BLM will work with renewable energy and transmission right-of-way applicants and the U.S. Fish and Wildlife Service (FWS) to ensure compliance with the BGEPA on BLM-managed public lands in California. This supplemental guidance does not replace the IM 2010-156 policies.

The BGEPA protects bald and golden eagles and their nests by prohibiting the take, possession, and commerce of such birds without a permit and also establishes criminal and civil penalties for violations of the BGEPA. Renewable energy projects on BLM-managed public land—most notably wind turbines and transmission infrastructure, but possibly other technologies and associated transmission—have the potential to affect eagles. The FWS may authorize the take of eagles for activities that are otherwise lawful, including renewable energy and transmission right-of-way authorizations, where such take is unavoidable even though advanced conservation practices are being implemented.

While renewable energy and transmission operators are not legally required to seek or obtain a BGEPA take permit under the Act, any take of an eagle without such a permit would be a violation of the BGEPA and could result in enforcement actions being taken against the owner and/or operator of the project. In addition, the BLM requires right-of-way grant holders to comply with all applicable Federal and State laws and regulations in accordance with 43 CFR

2805.12(a). Thus, while requesting an eagle take permit for a renewable energy or transmission right-of-way authorization on BLM-managed public land is voluntary, take without a permit is a violation of Federal law and a violation of the terms and conditions of the BLM right-of-way authorization. It should be noted, however, that the BLM will not require compliance with the BGEPA for operations or facilities located on lands not managed by the BLM.

Policy/Action: Coordination with the FWS and renewable energy and transmission right-of-way applicants should begin as early as possible in the review and permitting process. For wind energy right-of-way applications, the BLM will recommend that the right-of-way applicant begin collecting eagle data following Eagle Conservation Plan Guidance, Module 1–Land-based Wind Energy (FWS, 2013) during the type II wind testing authorization phase of a project. For all renewable energy and transmission right-of-way applications, the BLM will review available eagle information at the initial application stage to determine if the proposed project may have the potential for take under the BGEPA. Based on that initial review, the BLM will discuss potential eagle issues, data needs, and survey requirements, based on input from the FWS, with the right-of-way applicant during the second pre-application meeting required for development applications by the BLM Washington Office IM 2011-061, dated February 7, 2011.

The BLM will recommend renewable energy and transmission right-of-way applicants that may have the potential for take under the BGEPA to collect at least 2 years of eagle use data (FWS Eagle Conservation Plan Guidance, Module 1– Land-based Wind Energy, Appendix C, 2013) or other comparable data to assist in the National Environmental Policy Act (NEPA) analysis. This includes the NEPA analysis for connected-action projects on non-BLM lands. If the BLM, in coordination with the FWS, determines that the right-of-way application or connected-action has the potential for take under the BGEPA, the BLM will invite the FWS to become a NEPA cooperating agency in accordance with 40 CFR 1501.6.

If a right-of-way application has the potential for take under the BGEPA, the FWS will recommend that the project applicant prepare an Eagle Conservation Plan (ECP) and, if appropriate, submit a BGEPA take permit application. The BLM will request the FWS to provide written documentation of whether it is recommending that the right-of-way applicant apply for a BGEPA take permit. The BLM will not proceed with initiating the NEPA process for a project until written documentation of the FWS recommendation is received.

If the FWS recommends that a project applicant apply for a permit under the BGEPA, it is the right-of-way applicant's decision whether to do so. The BLM will request that the applicant provide documentation of this decision in writing by the end of the NEPA scoping period, as defined in the BLM's Notice of Intent. The BLM will not proceed with the NEPA process until this information has been received. The process from this point forward depends on the right-of-way applicant's decision whether or not to pursue a permit under the BGEPA.

BGEPA Take Permit Sought

If the right-of-way applicant decides to file a BGEPA take permit application (FWS Form 3-200-71, Eagle Non-purposeful Take Application), the right-of-way applicant must submit an acceptable take permit application package to the FWS in advance of release of the Draft Environmental Impact Statement (EIS) for the project to allow the relevant eagle information to be incorporated into the draft environmental analysis. The contents of this take permit

application package will be specified by the FWS. Upon receiving a take permit application package, the FWS will work directly with the right-of-way applicant to ensure the take permit application package is adequate for processing. The BLM will not issue a Draft EIS until an acceptable permit application package is completed and the information from the application package is incorporated into the environmental analysis.

The BLM will work with the FWS to coordinate the right-of-way and the BGEPA permitting processes. In most instances, the agencies will prepare a joint NEPA document that incorporates the analysis needed for the BLM to make a decision on the right-of-way application and the FWS to make a decision on the BGEPA take permit application. The BLM and the FWS will work together to develop purpose and need statements that cover each agency's decision to be made. The agencies will also jointly develop a range of alternatives to meet both agencies' purpose and need, and will coordinate on any mitigation actions and/or adjustments to the project needed to avoid, minimize, or compensate for impacts to eagles in coordination with the applicant.

The BLM and the FWS will coordinate on the issuance of the right-of-way and the BGEPA take permit decision documents to the extent practicable. If the FWS issues a take permit, it will impose monitoring, reporting, notification and other requirements that may be in addition to the mitigation and other requirements of the BLM right-of-way authorization. Upon issuance of a BGEPA take permit, compliance with its terms and conditions will become a condition of the BLM right-of-way authorization. The BLM right-of-way authorization will incorporate the BGEPA take permit conditions, just as a right-of-way grant incorporates other permit conditions such as those resulting from Endangered Species Act consultation. If the BLM issues a right-of-way authorization before the FWS issues a BGEPA take permit, the right-of-way authorization will include a stipulation automatically incorporating the conditions of the BGEPA take permit upon its issuance. The BLM, however, will not condition a BLM right-of-way authorization on an applicant's compliance with the terms of a BGEPA take permit for activities on non-BLM lands.

No BGEPA Take Permit Sought

If the right-of-way applicant decides not to apply for a BGEPA take permit, the BLM will continue to process the right-of-way application. In the NEPA document, the BLM will analyze any conservation measures proposed by the right-of-way applicant to avoid and minimize impacts on eagles. The NEPA analysis will include an eagle risk assessment. For wind projects, this assessment will follow Appendix D in the Eagle Conservation Plan Guidance, Module 1 – Land-based Wind Energy (FWS, 2013). As the FWS develops future guidance to address impacts to eagles from solar projects, the BLM will incorporate such guidance as appropriate into its NEPA analysis. The BLM may sign a Record of Decision and issue a right-of-way authorization that requires mitigation in accordance with 43 CFR 2805.12(i)(3)(i) to reduce impacts to eagles.

The terms and conditions of the right-of-way authorization should identify any actions that the applicant must perform if an eagle is taken and a take permit has not been obtained from the FWS. These terms and conditions, which will be included in the NEPA analysis, may require the right-of-way holder to implement limitations or restrictions of operations on an entire project or specific facilities, by season or time of day as appropriate, or other adaptive management measures deemed necessary by the BLM, in coordination with the FWS, to avoid further

unauthorized take of eagles. The terms and conditions will also state that these restrictions would be replaced by the terms and conditions of a BGEPA take permit, should the applicant obtain one. As noted above, the BLM will not condition a right-of-way authorization on an applicant's compliance with the terms of an eagle take permit for activities on non-BLM lands.

If the project takes an eagle without a take authorization, the project will be considered in violation of the BGEPA and the FWS retains sole authority to seek enforcement action against the project and the project proponent under the BGEPA. Regardless of whether the FWS seeks enforcement action, the BLM would retain its authority to suspend, terminate, or modify the project's right-of-way authorization in accordance with 43 CFR 2807.16 and 2807.17.

If a right-of-way applicant initially decides to follow the process described in this "No BGEPA Take Permit Sought" section, but later decides to pursue a BGEPA take permit during the NEPA process, that decision must be documented with the BLM and the FWS. The agencies will then follow the process described in the "BGEPA Take Permit Sought" section above. Such a decision may require the BLM-NEPA review process to be extended to incorporate information needed by the FWS to evaluate issuing a BGEPA take permit. This could require additional scoping, delay the release of draft NEPA documents, or require the preparation of supplemental NEPA documents to incorporate new alternatives, additional analysis, or other FWS required data or information.

Renewable energy and transmission right-of-way applications that have initiated the NEPA process at the issuance of this IM will follow the process laid out in this IM as closely as is feasible.

Timeframe: This IM is effective immediately.

Budget Impact: The processing of renewable energy right-of-way applications is subject to the cost recovery requirements of 43 CFR 2804.14. The coordination with the FWS outlined in this IM will likely result in added costs to both the BLM and the FWS in the processing of right-of-way applications. The BLM and the FWS signed an interagency MOU in May 2013 that provides a protocol process for the establishment of project-specific cost recovery agreements for the collection of cost recovery funds to support both agencies costs in processing right-of-way applications. See Information Bulletin 2013-074, dated May 30, 2013. However, it should be noted that the cost recovery fees collected under the requirements of 43 CFR 2804.14 are limited to those costs related to the processing of the Title V-FLPMA right-of-way application.

Background: On September 11, 2009, the FWS published "Eagle Permits; Take Necessary to Protect Interest in Particular Localities; Final Rules" in the Federal Register, creating a regulatory mechanism by which individual and programmatic "take" of bald and golden eagles could be permitted under the BGEPA for authorized uses and activities on BLM-administered lands. The BLM issued Washington Office IM 2010-156 on July 9, 2010, to provide direction for complying with the BGEPA, including the 2009 Rule.

Manual/Handbook Sections Affected: None.

Coordination: This IM has been coordinated with the FWS Pacific Southwest Regional Office. The attached Memorandum of Understanding between BLM California and the FWS Pacific Southwest Region documents the agreement between the agencies to work together on BGEPA implementation and renewable energy.

Contact: If there are any questions regarding this IM, please contact Mike Sintetos, Renewable Energy Program Manager at (916) 978-4639, or Amy Fesnock, Threatened and Endangered Species Program Manager at (916) 978-4646.

Signed by:
James G. Kenna
State Director

Authenticated by:
Richard A. Erickson
Records Management

Attachment

1 - Memorandum of Understanding between the Bureau of Land Management, California State Office, and the Fish and Wildlife Service, Pacific Southwest Region regarding the Joint Environmental Review of Renewable Energy Projects (5 pp)